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Supreme Court, U. S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

VICTORIA S. LONDON, et al.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUSTIONS PRESENTED

1. Whether the heirs of a serviceman, killed in the line of duty by the negligence of a civilian employee working for a different branch of the armed forces, can maintain a civil action against the United States of America.

2. Whether the United States of America has sovereign immunity from suit except insofar as it expressly waives that immunity by statute.

3. Whether the Federal Tort Claims Act waived the sovereign immunity of the United States of America in the circumstances of this case.

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VICTORIA S. LONDON, et al.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Victoria S. London, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 16, 1980.

QUESTIONS PRESENTED

1. Whether the heirs of a serviceman, killed in the line of duty by the negligence of a civilian employee working for a different branch of the armed forces, can maintain a civil action against the United States of America.

2. Whether the United States of America has sovereign immunity from suit except insofar as it expressly waives that immunity by statute.

3. Whether the Federal Tort Claims Act waived the sovereign immunity of the United States of America in the circumstances of this case.[1]

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[1]Petitioners in this proceeding are:
(a) Victoria S. London; Shannon Renee London and Eric R. London, minors, by and through Victoria S. London, their guardian ad litem; Celestine London;Charles London; all of whom are the heirs at law or dependent parents of Airman 1st Class Dennis E. London, deceased;
(b) Michael McMullen and Lisa McMullen, minors, by and through Jill McMullen, their guardian ad litem, Jill McMullen, all of whom are the heirs at law of SSgt. George E. McMullen;

(c) Henry L. Collums; Mavis J. Collums; who are the heirs at law or dependent parents of Sgt. Bobby G. Collums;

(d) Andrew Glenn, a minor, by and through Susan G. Glenn, his guardian ad litem; Susan G. Glenn; Everitt S. Glenn; Jessie Mae Glenn; all of whom are the heirs at law or dependent parents of TSgt. Jackie D. Glenn;

(e) Betty R. Moran; Edgar Moran; who are the heirs at law or dependent parents of Airman 1st Class Edgar C. Moran II;

(f) Freeman S. Raber; Marjorie A. Raber; who are the heirs at law or dependent parents of Sgt. Paul J. Raber;

(g) Myrtle Black, who is the heir at law or dependent parent of Sgt. Jimmie P. Black;

(h) Joanne Froehlich; Theodore E. Froehlich; who are the heirs at law or dependent parents of 1st Lieutenant Laurence E. Froehlich;

(i) Marella Dean Weldon; Charles Weldon; who are the heirs at law or dependent parents of Airman 1st Class Robert P. Weldon;

(j) Dolores J. Favourite; James W. Hamlin, SR., who are the heirs at law or dependent parents of Sgt. Darrell Hamlin;

(k) Maybelle Lane and Eldon C. Bageant; who are the heirs at law or dependent parents of Sgt. Michael D. Lane.

Respondent is the United States of America.

INDEX

	Page
Questions presented.....	2
Opinions below.....	8
Jurisdiction.....	8
Constitutional provisions and Statutes involved.....	9
Statement of the case.....	10
Reasons for granting the writ....	13
I. The United States Government Should Not Have Sovereign Immunity from Tort Liabiity..	13
II. The Feres Doctrine as it Has Been Developed in the Lower Courts Should be Modified....	24
Conclusion.....	34
Appendix(Opinion and Judgment of Court of Appeals).....	36

CITATIONS

Cases:

Afroyin v. Rusk, 387 U.S. 253.....	20
Brooks v. U.S.,337 U.S.49.....	25,26 28
Brown v. Wichita State Univ.217 Kan. 279.....	15,34
Callaway v. Garber, 289 F.2d 171..	27

Chisholm v. Georgia,2 Dallas 418..17

Coffey v. U.S., 324 F.Supp.1087 (C.D.Cal.1971).....32

Cohens v. Virginia, 6 Wheat.264...17,18

Downes v. U.S., 249 F.Supp. 626...32

Feres v. U.S.,340 U.S. 135.....24,26 27,29 31,32 33,34

Frazier v. U.S.,372 F.Supp.208....29

Hale v. U.S., 452 F.2d 668.....31

Hand v. U.S.,260 F.Supp.38.....30

Hicks v. State,88 N.M.588.....15

Homlitas v.U.S., 202 F.Supp.520...31

Kawananakoa v. Polybank, 205 U.S. 349.....19

Knoch v. U.S., 316 F2d 532.....27

Layne v. U.S., 295 F.2d 433.....29

Mills v. Tucker, 499 F.2d 866.....30

Mower v. Men of Leicester, 9 Mass. 247.....15

Muskopf v. Corning Hosp.Dist. 359 P2d 257.....16

Orken v. U.S., 239 F.2d 850.....32

Preferred Ins. Co. v. U.S. 222 F.2d 942.....32

Rayonier v. U.S., 352 U.S. 315....28

Russell v. Men of Devon,100 Eng. Rept. 349.....14

Sapp v. U.S. 153 F.Supp.496.....32

Schwager v. U.S., 326 F.Supp. 1081.....28

The Siren, 74 U.S.....19

Snyder v. U.S., 118 F.Supp.585... 32

Stencel Aero Eng. Corp.v. U.S. 431 U.S. 666..... 29,33

United Svcs. Auto Assoc. v.U.S. 285 F.Supp. 854.....

U.S. v. Brown, 348 U.S. 110..... 27,33

U.S. v. Clarke, 33 U.S..... 19

U.S. v. Mitchell, __U.S.__, L.Ed.2d 607 (1980)..... 14

U.S. v. Muniz, 374 U.S. 150..... 28

U.S. v. Nixon, 418 U.S. 683..... 17

U.S. v. Yellow Cab Co., 340 U.S. 543..... 23

Willis v. Dept. of Conserv.& Econ. Dev't., 55 N.J. 534.....16

Yick Wo v. Hopkins, 118 U.S. 356..21

MISCELLANEOUS

Borchard, Government Liability in Tort, (1924)..... 14

Street, Tort Liability of the State, Mich. L.R. 341 (1949)....14

OPINIONS BELOW

None of the opinions below were reported. The opinion of the United States Court of Appeals for the Ninth Circuit, filed September 16, 1980, appears at pages 1 and 2 of the Appendix herein. The Memorandum of the United States District Court for the Northern District of California appears at pages 3 through 16 of the Appendix. Judgment of the United States District Court for the Northern District of California appears at pages 17 and 18 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals of the Ninth Circuit was entered on September 16, 1980. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED

The United States Constitution,

Article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States, -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

United States Code, Title 28:

> "§1346(b). Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after

January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

"§ 2674. Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

"§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to--

. . .

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

STATEMENT OF THE CASE

Petitioners are the heirs at law or dependents of 12 members of the United States Air Force who died in a helicopter

crash in Thailand on May 13, 1975. Decedents had been participating in a rescue operation in Thailand, when the Sikorsky CH-53-C helicopter which they were assigned for the operation crashed in flight,killing all aboard. The crash was caused by the in-flight failure of the helicopter's main rotor head.

The rotor head had been rebuilt by the Naval Air Rework Facility ("NARF") at North Island San Diego, California, prior to installation on the helicopter. This facility, while nominally under the U.S. Navy, is actually operated entirely by civilian employees of the federal government. NARF conducts a business of repairing and rebuilding aircraft and aircraft components, charging for this service, and also purchases used aircraft for reconditioning and resale.

The rotor head from decedents' hel-

icopter was reconditioned by NARF in May of 1974. During the reconditioning process, certain civilian employees at NARF negligently failed to install a vitally important metal liner in the rotor head before installing one of the helicopter blades. Thereafter, the rotor head assembly was attached to decedents' helicopter and in due time the inevitable crash occurred.

Petitioners filed claims against the U.S. Air Force and the U.S. Navy and, after the claims were rejected, filed a civil action for wrongful death on January 27, 1978. Jurisdiction was based on Article 3, Section 2 of the United States Constitution and Title 28 U.S.C. Section 1346(b). The United States answered, and on April 27, 1978, filed a motion to dismiss the action under Rule 12(b)(6) Federal Rules of

Civil Procedure, on the ground that the court lacked jurisdiction to entertain a tort claim against the United States arising out of injury or death to servicemen in the course of their duty. The motion was granted, and judgment entered on July 27, 1978. Petitioners appealed and the judgment was affirmed on September 16, 1980.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES GOVERNMENT SHOULD NOT HAVE SOVEREIGN IMMUNITY FROM TORT LIABILITY

The trial court, in its order dismissing the complaint, held that the federal government has sovereign immunity except where it has, by statute, consented to waive it. Petitioners contend that this conclusion is erroneous, because the doctrine of sovereign immunity is an obsolete relic of English common law which has no appli-

cation in this country. In making this contention, petitioners acknowledge that very recent decisions by this Court uphold the doctrine, see e.g., United States v. Mitchell, __U.S._, _S.Ct._, 63 L.Ed.2d 607 (1980), but contend nevertheless that the doctrine should be reexamined.

A. Sovereign Immunity in State Courts.

The doctrine of sovereign immunity has its roots in the English feudal structure under which the king, but not his officer, had personal immunity. See generally, Street, Tort Liability of the State, Mich.L.R. 341 (1949); Borchard, Government Liability in Tort, 34 Yale Law Journal 1, 7 (1924). General governmental immunity seems to have been enunciated later in the case of Russell v. Men of Devon, 100 Eng. Rept.

349, involving a suit by an individual against an unincorporated township, and was subsequently applied by American courts to municipal corporations and other governmental entities generally in Mower v. Men of Leicester, 9 Mass.247 (1812). Sovereign immunity, however, has come under increasing criticism in state courts. Twelve states have judicially abolished the doctrine for all governmental entities, several have judicially abolished it for local entities, and others have abolished the doctrine entirely or in part through legislative action. See, generally,Appendix to Hicks v. State,88 N.M. 588, 544 P2d 1153 (1976). In general, the court decisions have pointed out that the doctrine is based upon concepts of English law which have absolutely no application to this country, and is

contrary to the fundamental concept of American jurisprudence that the individual should not suffer for acts which are the responsibility of the populace as a whole. See, Muskopf v. Corning Hosp. Dist. 55 C2d 211, 11 Cal.Rptr. 84, 359 P2d 457 (1961).

By retaining only a limited immunity for discretionary acts, see Willis v. Dept.of Conser.& Econ.Dev't, 55 N.J. 534, 264 A.2d 34 (1970): Brown v. Wichita State University, 217 Kan.279, 540 P2d 66 (1975); cf. Calif. Govt. Code, §815.2,820, 820.2, state governments have ample protection without undue harassment, and yet do not sacrifice public safety to the convenience of the public servant.

B. Federal Sovereign Immunity.

The doctrine of federal sovereign immunity, however, has followed quite a different course in federal courts.

Article III of the United States Constitution gives the Supreme Court judicial power over cases in "which the United States shall be a party. . . ." In the landmark case of Chisholm v. Georgia, 2 Dallas 418, 1 L.Ed.440 (1792) Chief Justice John Jay noted that the above language plainly stated that any citizen could sue the United States in federal court. Id. at 1 L.Ed. 478. The only objection to this interpretation was the practical one that the courts might not be able to summon the executive power of the government to enforce a judgment.[2] Nevertheless, the question was expressly left open.

In the landmark case of Cohens v. Virginia, 6 Wheat. 264, 5 L.Ed.257(1821) however, Chief Justice John Marshall

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[2]Any doubts about the power of the judiciary in this regard must surely have disappeared after U.S. v. Nixon, 418 U.S. 683 94 S. Ct. 1090,41 L.Ed.2d. 1039 (1974).

stated in dicta:

> "The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorized such suit."

Marshall made this statement in distinguishing appellate review by way of a writ of error from original jurisdiction. Although the Eleventh Amendment forbade the federal court to entertain suits by citizens of one state against another state, the Supreme Court held in Cohens that it could exercise appellate review of civil or criminal actions by a state against the citizens of another state when a federal question was involved. By way of example, Marshall stated that in similar fashion the Supreme Court could review a case in which the United States was a plaintiff, even if the federal court could not (according to this argument) enter-

tain suits against the United States directly. This dictum was, nevertheless, adopted as authoritative, and subsequent cases upheld the doctrine that the federal government could not be sued without its consent. See, e.g., U.S. v. Clarke, 33 U.S. (8 Pet.)436 8 L.Ed. 1001 (1834).

Following these early pronouncements, some attempt was made to rationalize this doctrine. In The Siren, 74 U.S. (7 Wall.)152,19 L.Ed.129 (1868), Justice Fields stated:

> "The doctrine rests upon reason of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen and consequently, controlled in the use and disposition of the means required for the proper administration of Government." Id. at 19 L.Ed. 130-131."

In Kawananakoa v. Polybank,205 U.S.

349, 353, 27 S.Ct. 625 51 L.Ed. 839 (1907), Justice Holmes said:

> "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical grounds that there can be no legal right as against the authority that makes the law on which the right depends."

These cases, and others relying on them, enunciate two bases for the supposed immunity of the federal government. First, sovereign immunity as a philosophical concept rests on the argument that there must be an ultimate lawmaker, and that since this ultimate authority can nullify any law it pleases, there can be no law which binds the sovereign itself. Second, governmental immunity as a pragmatic theory rests on the supposed necessity of government to be free from interference with its activities by civil court.

The basic premise to the doctrine

of sovereign immunity is that the government is the sovereign. This premise, however, has never been accepted in this country. Under the American constitutional system, the people, and not the federal government, are the ultimate repository of all authority. Cf. Yick Wo v. Hopkins, 118 U.S. 356 at 370 6 S.Ct. 1064 30 L.Ed.220 (1886). In Afroyin v. Rusk,387 U.S. 253, 18 L.Ed. 2d 757, 87 S.Ct. 1660 (1967), this Court overturned a federal statute depriving a person of citizenship involuntarily under certain conditions,stating:

> "In our country the people are sovereign and Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones." Id at 257.

Although Congress may enact statutes,

the executive may enforce them, and the judiciary interpret them, the basic political power still resides in the people. They elect the Congress and President, and they retain power, through the amendment process, to change the very foundations on which the government is based.[3] Accordingly, the doctrine of sovereign immunity of the federal government has no logical application in American law.

The related doctrine of governmental immunity, which rests on supposed considerations of practicality rather than legal theory has been repudiated by historical experience. to the extent that limits are necessary to

[3]Since sovereign immunity, as it was enunciated by English courts, applied only to the person of the monarch, and not to subordinate officers, if the doctrine is applied to American law, the logical conclusion is that the government, in its role as the servant of the sovereign American peoples, is liable for all its wrongful acts.

protect governmental functions, the doctrine extending immunity to discretionary acts has provided ample protection for state governments, and should work equally well at the federal level. Finally, the scope of the Federal Tort Claims Act itself, see, e.g., United States v. Yellow Cab Co., 340 U.S.543, 71 S.Ct. 399,95 L.Ed.523 (1951), demonstrates that broad governmental immunity is not necessary to the proper functioning of government. Given the fundamental unfairness of governmental immunity, whereby the innocent victim is made to bear the loss caused by the government which is supposed to serve him, this doctrine likewise has no place in American jurisprudence. This Court should reexamine and repudiate this doctrine as a non-statutory, unconstitutional basis for immunizing the federal government from liability.

II. THE FERES DOCTRINE AS IT HAS BEEN DEVELOPED IN THE LOWER COURTS SHOULD BE MODIFIED

The second basis on which the trial court dismissed the complaint was that under the doctrine of Feres v. United States, 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153 (1950), plaintiffs had no tort remedy under the Federal Tort Claims Act. Appellants contend that the Feres doctrine, as it has been applied by lower federal courts, should be reviewed and modified. At the present time the doctrine has resulted in a confusing and inconsistent body of case law, under which servicement have been granted or denied the right to sue the federal government on an almost whimsical basis.

Prior to the enactment of the Federal Tort Claims Act there was no statutory provision for a suit in tort against the United States. In 1946,

Congress enacted the Federal Tort Claims Act, which provided in part that the United States would be liable for money damages for personal injury or death caused by the negligent or wrongful act or omission of a federal employee "in the same manner, and to the same extent as a private individual in like circumstances. . . ." Several exceptions were provided in the act, including "any claim arising out of the combatant activities of the military. . . during time of war." Although sixteen previous tort claims bills introduced between 1925 and 1935 contained exceptions expressly denying rec very to members of the armed services, the present act, as originally introduced and enacted, did not contain this exception. See Brooks v. United States, 337 U.S.49 at 51-2, 93 L.Ed.1200,69 S.Ct.918(1948).

Shortly after the Federal Tort

Claims Act was enacted, the Supreme Court heard a series of cases in which servicemen were suing the federal government. In Brooks v. United States, supra, this Court allowed recovery by two servicemen against the United States noting that Congress had not seen fit either to exclude specifically the claims of servicemen, or to make veteran's benefits the exclusive remedy. The court noted, however, that a different case might be presented if the claims arose from activities incident to the plaintiff's military service. Id at 52. In Feres v. United States, supra, 340 U.S. 135, this Court answered in the negative the question reserved in Brooks of whether a serviceman could recover from the federal government for injuries caused by activities incident to his military service. The two broad rationales of Feres were that the "distinc-

tively federal" relationship between the government and the armed forces made it inappropriate to apply the law of the place of injury to such cases, and that Congress' provision of generous military benefits implied that a serviceman should be limited to those benefits. In the subsequent case of U.S.v.Brown,348 U.S. 110, 99 L.Ed.139,75 S.Ct.141(1954), the court announced a third factor,that allowance of such suits would have an adverse effect on military discipline. This final factor, the conflict between civil litigation and military discipline, is the true logic of the Feres doctrine. This was the main thrust of the opinion in U.S.v.Brown,supra, 348 U.S.110,112-113, and several subsequent lower court cases have reiterated it. See, e.g. Callaway v. Garber,289 F.2d 171(9th Cit. 1961); Knoch v. U.S., 316 F2d 532(9th Cir.1963); United Svcs.Auto Assoc.v.U.S.

285 F.Supp. 854 (D.C.N.Y. 1968); Schwager v. U.S., 326 F.Supp.1081(D.C. Pa.1971). Almost every other point mentioned in Feres has been repudiated as a rationale for denying recovery in other cases. In Brooks,supra, at 53 the court refused to imply an exclusive remedy provision when Congress had enacted none. In Rayonier v. United States, 352 U.S. 315,77 S.Ct. 374,1 L.Ed.2d 354 (1957), the court refused to immunize the United States from liability for the negligent acts of its firefighters merely because such liability was novel and unprecedented. Finally, in U.S.v. Muniz, 374 U.S. 150,83 S.Ct.1850,1 L.Ed. 2d 805(1963),the court refused to deny federal prisoners a right of action under the Act merely because the right would be governed by the laws of the state where the injury occurred. The only rationale which has been fairly

consistently repeated is that suits by servicemen will disrupt military discipline. See Stencel Aero Eng. Corp. v. U.S., 431 U.S.666 at 673,52 L.Ed.2d 665, 97 S.Ct. 2054 (1978).

The attempts of the lower federal courts to apply the Feres doctrine to suits by servicemen however, have led to extremely inconsistent results. Under Feres, a serviceman cannot bring an action for injury against the federal government if, at the time he received the injury, he was engaged in an activity incident to his military service. Though the tortfeaser is a civilian government employee whose activities have little or no connection with the military, a plaintiff injured on active duty will still be barred. See Frazier v. U.S.,372 F.Supp.208(D.C.Fla.1973)(defendant civilian government employee);Layne v. U.S. 295 F.2d 433 (7th Cir.1961)

(defendant FAA Tower control operator). Once the "incident to service" bar has been avoided, either because plaintiff was on a furlough at the time of the injury, Mills v. Tucker, 499 F.2d 866 (1974) or on a pass, Downes v. U.S. 249 F.Supp. 626 (D.C.N.C. 1965), plaintiff may even bring suit even if the litigation involves charges of active negligence directed against another soldier. See Hand v. U.S., 260 F.Supp. 38 (D.C.Ga. 1966).

Federal courts have come to inconsistent conclusions even in cases involving servicemen on leave. In Downes v. U.S., supra, 249 F.Supp. 626, a serviceman on pass, injured in a collision on base with another serviceman, was allowed to maintain an action under the Federal Tort Claims Act. In Coffey v. U.S., 324 F.Supp. 1087 (C.D.Cal. 1971), aff'd 455 F.2d 1380 (9th Cir. 1972), however, a

serviceman injured on his way to off-port liberty by a collision with a switch engine was not allowed to bring suit against the government, because a serviceman, even on liberty, remains subject to military discipline while on base. As the court pointed out in Homlitas v. U.S.,202 F.Supp.520(N.Cal. 1962),however, a serviceman is subject to military discipline at all times during his tenure of service, whether or not he is on leave. See also 10 U.S.C. §802,805. Thus, cases allowing or denying recovery to a serviceman depending on whether or not he was subject to military discipline[4] at the time are based on a distinction without a difference.

Perhaps the most peculiar distinctions in the Feres doctrine cases have been drawn in cases involving airplanes

[4] See,e.g.,Hale v. U.S.,452 F.2d 668 (6th Cir. 1971).

falling on servicemen's houses. See Snyder v. U.S.,118 F.Supp.585(D.C.Md. 1967),aff'd and mod'fd 218 F.2d 266, judm't reinst'd 350 U.S.906(recovery allowed); Sapp v. U.S.153 F.Supp.496 (D.C.La.1957)(recovery allowed);Preferred Ins. Co.v.U.S.,222F.2d 942(9th Cir.1955) cert.den.350 U.S. 837 (recovery denied);Orken v.U.S.,239 F.2d 850(6th Cir.1956)(recovery denied). In all these cases, a military plane fell on a serviceman's house, when the serviceman was off-duty, but not on furlough. The sole distinguishing factor in these cases, as to whether or not the injury was "incident to service," was whether or not the homes of the servicemen were on or off the military base. This distinction, and the other drawn by lower courts applying the Feres doctrine, have absolutely nothing to do with any concern for military disci-

pline.

The concern for military discipline expressed in Feres and Brown, and subsequently in Stencel Aero, is undoubtedly valid. Since Congress did not see fit to exclude such claims expressly from the provisions of the Federal Tort Claims Act, however, the limitation on a serviceman's right to sue the federal government should be no broader than is necessary to protect this legitimate interest. The foregoing cases show that the effect of civil litigation on military discipline is actually determined by the status of the federal employee tortfeasor, rather than plaintiff's status. If the injury-causing activity consists of the acts or omissions of military personnel on active duty, then the litigation may well be disruptive of military discipline whether or not plaintiff was on active duty at the

time of the injury. If plaintiff is injured solely because of the act or omission of a civilian federal employee,however, then plaintiffs status has no bearing on military discipline. Under this analysis, the question determining plaintiff's right to sue is not whether or not plaintiff is engaged in an activity incident to his military service, but, rather whether or not the injury was caused by a member of the armed forces in an activity incident to his service. In the present case, since petitioners have alleged that the accident was caused by the negligence of civilian federal employees in the repair and rebuilding of the Sikorsky helicopter they should not be barred by the Feres doctrine.

CONCLUSION

For the foregoing reasons a writ

of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

	Page
Opinion of the 9th Circuit Court of Appeals	1
Memorandum of the U.S. District Court for the Northern District of California	3
Judgment of the United States District Court for the Northern District of California	17

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Sep 16 1980
Richard H. Deane
Clerk, U.S. Court of Appeals

VICTORIA S. LONDON, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 78-2817
DC #78-0213
MEMORANDUM

Appeal from the United States District Court for the Northern District of California, Honorable William Sweigert District Judge, Presiding

Submitted September 2, 1980

Before: BROWNING, Chief Judge, SKOPIL and NORRIS, Circuit Judges

Feres v. United States, 340 U.S. 135 (1950), as recently reaffirmed and extended in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), prohibits suit against the United States under the Federal Tort Claims Act for injuries to servicemen that occur, as in this case, in the course of activity incident to military

service. This court has consistently rejected plaintiffs' contention that there must be a specific showing of harm to military discipline in order to invoke the Feres doctrine. See, e.g., Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979); United States v. Lee, 400 F. 2d 558 (9th Cir. 1968). Moreover, in both Uptegrove, 600 F. 2d at 1250-51, and Lee, 400 F. 2d at 1250-51, and Lee, 400 F.2d at 565, cases involving suit against the government for the alleged negligence of civilian FAA air traffic control employees, this court also rejected plaintiffs' argument that the status of the tortfeasor as opposed to that of the injured party, should be determinative of the applicability of the Feres doctrine.

Affirmed.

FILED
Jul 26 1978

William H. Whittaker,
Clerk

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VICTORIA S. LONDON, et al., Plaintiffs, -vs- UNITED STATES OF AMERICA, Defendant.	No. C78 0213 WTS MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This is a wrongful death action, brought against the United States under the Federal Tort Claims Act (28 USC §2671 et seq) (hereinafter "FTCA") and 28 USC § 1346(b)[1/] by plaintiffs, the surviving heirs and parents of the decedents, military servicemen on active military duty

1/ 28 USC § 1346(b), quoted infra, provides district courts with exclusive jurisdiction over civil actions based on claims made under the Federal Tort Claims Act.

killed in a helicopter crash on or about May 13, 1975, in Thailand, alleging negligent repair and maintenance of the helcopter by the United States. Plaintiffs seek money damages for the wrongful death of the decedents.

The action is presently before the court on the defendant's motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6), F.R. Civ.P.

Allegations of the Complaint[2/]

The complaint alleges, in substance, that on or about May 13, 1975, a Sikorsky CH-53C helicopter, assigned to the 56th Special Operations Wing of the United States Air Force and being operated by the Air Force, crashed while on an operational staging flight in Thailand. All the servicemen aboard were killed in the crash.

2/Defendant's motion is one directed solely to the allegations of the com-

plaint. Plaintiff's opposition papers contain a purported "statement of facts" of the case. However, since such "facts" are not in proper evidentiary form they do not convert the defendant's Rule 12 (b)(6) motion into a summary judgment motion under Rule 56, F.R.Civ.P. Accordingly, this court will look only to the allegations of the complaint. See, Smith v. Mack Trucks, Inc.,505 F.2d 1248 (9th Cir. 1974)(per curiam).

The court notes that on July 17, 1978, the plaintiff's counsel, Gerald Sterns, filed a twelve page affidavit, with attached exhibits totaling over 300 pages, presumably to provide an evidentiary record for the motion. However, this was filed over a month after June 12, 1978, the date the motion was taken under submission on the record before the court (see this court's Order Modifying Status Conference Order, filed May 16, 1978, Docket 13) and hence, the court will not consider it. Even if the affidavit and exhibits had been timely filed along with plaintiff's opposition papers, the court could choose to exclude it. Rule 12(b), F.R. Civ. P.

The complaint further alleges, in substance, that the cause of the crash was an in-flight failure of the main motorhead due to fatigue and failure of one of the sleeve and spindle assemblies of the motorhead; that the United States, acting through various agencies including the United States Air Force, the United States Navy (and specifically the Naval Air Rework facility located in San Diego, California), were negligent with respect to maintenance and repair of the motorhead; that the Naval Air Rework Facility was established and operated, maintained and controlled by the United States Navy for the purpose of inspecting, repairing, overhauling, and performing other maintenance and repair on military ordinance and equipment; and that the Naval Air Rework Facility, while nominally under the command and control of active United States Navy personnel, was in fact

operated and controlled by civilian employees of the United States and was operated essentially as a civilian facility carrying on a proprietary business in effect for profit.

The complaint further alleges that in May, 1974, the six sleeve spindle assemblies of a motorhead assembly of the type used in the helicopter in question, arrived at the Naval Air Rework Facility; that the components were processed in order to restore them to operational condition; that in such processing a civilian employee of the United States negligently and carelessly mixed up the sleeve and spindle assemblies, confused the accompanying paperwork, and failed to make several critical cross-checks and inspections - with the result that one sleeve and spindle assembly completed the processing without the installation of a critical part called a liner; that

unqualified personnel were allowed to work on the sleeve and spindle assemblies in question and that no reasonable inspection was enforced; and that the civilian personnel knew or should have known that the failure to install such a liner would lead to catastrophic results, especially since such a defect could not be detected in any sort of normal field inspection or in normal operational use; and that the faulty sleeve and spindle assembly was installed in the helicopter in question and failed because of a fatigue crack, disintegrated and destructed while the helicopter was in flight, causing the crash.

The complaint also alleges, in substance, that plaintiffs' decedents were, at the time of the crash and their deaths, on active military duty with the United States Air Force in a non-combat situation.

Contentions of the Parties

The defendant contends that the allegations of the complaint fail to state a claim upon which relief can be granted, noting that the United States possesses sovereign immunity that bars this action unless waived by legislation, and that the United States cannot be held liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or are sustained in the course of activity incident to military service, relying mainly on Feres v. United States, 340 U.S. 135 (1950).

The plaintiffs contend that (1) the United States has no sovereign immunity, and that (2) the facts of the present case - involving negligence of the United States while engaged in a proprietary function at the Naval Air Rework Facility - distinguishes this

case from Feres and the underlying rationale of Feres.

The Court's Conclusions as to the Applicable Law

Plaintiff's first contention - that the United States has no sovereign immunity - ignores long-established United States Supreme Court cases holding precisely to the contrary. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941); accord, United States v. Testan, 424 U.S. 392, 399 (1976); Hill v. United States, 571 F.2d 1098, 1101 (9th Cir. 1978).

However, the United States, under the FTCA, has given a limited consent to be sued. See 28 USCA § 2674 and 28 USCA § 1346(b).

But the Supreme Court, in three consolidated Federal Tort Claims Act

cases involving negligent conduct of the United States resulting in personal injury or death to active servicemen, has held "that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Feres v. United States, 340 U.S. 135, 146 (1950). (emphasis added). This holding of Feres has been recently reaffirmed by the Court in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).

In Stencel Aero, a military serviceman on active duty was injured while flying a F-100 fighter aircraft when the life-support ejection system of the aircraft malfunctioned. The serviceman brought a personal injury negligence action against Stencel Aero, the aircraft manufacturer, and the United States. The manufacturer then cross-claimed against

the United States for indemnity. The district court dismissed the serviceman's claim against the United States and the manufacturer's cross-claim against the United States, relying on the Feres case. The Supreme Court, in reviewing the dismissal of the manufacturer's cross-claim, held that the United States cannot be held liable under the Federal Tort Claims Act on such third-party indemnity claims.

In reaching this result the Court in Stencel Aero articulated three factors to be considered. First, since the relationship between the United States and its military servicemen is distinctively federal in character, it makes no sense to have the liability of the United States to servicemen dependent on the vagaries of state law (as is the case under the FTCA) and where the serviceman happened to be stationed at the

time. Second, the Veterans' Benefits Act (38 USC § 321 et seq), establishes, as a substitute for tort liability, a statutory no-fault compensation scheme with generous pensions. Third, since there is a special and peculiar relationship between a serviceman and his superiors, such civil actions for personal injury or death might undercut military discipline or military performance.

Plaintiff's attempt to distinguish Feres and Stencel Aero on the basis of the underlying rationales of those cases is without merit.

The first factor articulated in Stencel Aero and derived from Feres - the federal nature of the relationship between the United States and its military servicemen - is clearly applicable herein. The second factor articulated in Stencel Aero and derived from Feres - the separate statutory compensation

scheme for survivors and dependent parents of servicemen killed in active duty - is also clearly applicable herein because of the multiple benefits available to plaintiffs herein (including death benefits, medical care, disability compensation, and other compensations). The third factor - possible adverse impact on military discipline - is also clearly applicable herein.

Furthermore, plaintiff's attempt to distinguish under the Federal Tort Claims Act, between traditional sovereign functions of the United States and proprietary functions of the United States, permitting liability under the latter, has twice been flatly rejected by the Ninth Circuit. "No distinction is to be drawn between sovereign and proprietary functions in determining liability under the Federal Tort Claims Act." Air Transport Associates v. United

States, 221 F.2d 467, 470 (9th Cir.1955); accord, United Air Lines, Inc. v. Wiener, 335 F.2d 379, 396 & n.16 (9th Cir. 1964).

Finally, plaintiff's contention that continued application of the Feres rule denies them due process and equal protection under the law is without merit.

Since the complaint concedes that the plaintiffs' decedents were killed while on active military duty, plaintiffs' claims herein are clearly barred under the holding of Feres. See, United States v. Lee, 400 F.2d 558 (9th Cir. 1968); Henninger v. United States, 473 F.2d 814 (9th Cir. 1973).

Since it appears to the court that plaintiffs will not be able to recover under any set of facts proved, the complaint is dismissed with prejudice and without leave to amend. Fairyland Amusement Co. v. Metromedia, 412 F.Supp.1290, 1293 (D.C.Mo. 1976); Bonnano v. Thomas,

309 F.2d 320, 322 (9th Cir. 1962).

Accordingly, defendant's motion to dismiss for failure to state a claim upon which relief can be granted is hereby granted and the action is dismissed.

Dated: July 26th, 1978

W.T. Sweigert
United States District Judge

FILED

Jul 26 1978

William L. Whittaker, Clerk

Entered in Civil Docket July 27,1978

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VICTORIA S. LONDON, et al., Plaintiffs, -vs- UNITED STATES OF AMERICA, Defendant.	No. C78 0213 WTS JUDGMENT [Rule 58,F.R. Civ.P.]

This action came on for hearing before the Court, The Honorable William T. Sweigert, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing, and that the action be dismissed for failure to state

a claim upon which relief can be granted.

Dated: July 26th, 1978.

W.T. Sweigert
United States District Judge